

Before the  
Federal Communications Commission  
Washington, DC

In the Matter of )  
 )  
Atlantic Tele-Network, Inc. ) WT Docket No. 09-119  
 )  
and )  
 )  
Verizon Wireless )  
 )  
Applications for Consent to Assignment of )  
Licenses and Transfer of Control )

FILED/ACCEPTED  
AUG 27 2009  
Federal Communications Commission  
Office of the Secretary

**REPLY OF TELEPHONE USA INVESTMENTS, INC.**

Telephone USA Investments, Inc. ("Telephone USA"), by its attorneys and in accordance with the Commission's July 9, 2009 *Public Notice*, hereby submits this reply to the joint opposition of Atlantic Tele-Network, Inc. ("ATNI") and Verizon Wireless (the "Joint Opposition") to Telephone USA's petition to deny (the "Petition") the applications in the above-referenced proceeding.<sup>1</sup> There is nothing in the Joint Opposition that refutes the central points of the Petition; indeed, Verizon Wireless and ATNI carefully sidestep the key issues raised by Telephone USA. Consequently, the Commission should deny these applications and require Verizon Wireless to afford independent small, minority- and women-owned businesses a realistic, fair and documented opportunity to purchase assets being divested to meet the conditions in the *Alltel Merger Order*.<sup>2</sup>

<sup>1</sup> See Atlantic Tele-Network, Inc. and Verizon Wireless Seek FCC Consent to Assign or Transfer Control of Licenses and Authorizations, *Public Notice*, DA-09-1515 (2009).

<sup>2</sup> Applications of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17444 (2008) (the "Alltel Merger Order"), *reconsideration pending*.

This reply will focus on two issues. First, the public interest claims made by Verizon Wireless and ATNI are overstated at best, and are insufficient to support grant of their applications, particularly in the context of the other issues raised by those applications. Second, Verizon Wireless and ATNI fail to confront the central issue in the Petition, which is that the sale process did not address any of the specific concerns of independent small, minority- and women-owned businesses.

**I. The Proposed Transaction's Public Interest Benefits Are Negligible.**

The first third of the Joint Opposition is an effort to bolster the public interest showing in the applications. It adds almost nothing to the record, and does not support a conclusion that this transaction would provide any meaningful public interest benefits.

The key consideration in this case is that there is no cognizable public interest benefit from the sale of the markets that are the subject of the applications. The sale is an obligation resulting from the *Alltel Merger Order*, and any benefits from the divestiture of these markets already were accounted for in that order.<sup>3</sup> Any claimed benefit from “partially fulfilling the divestiture obligations imposed by the Commission” or from “establish[ing] a fresh competitive presence” in the affected markets is a result of the *Alltel Merger Order*, not of the proposed transaction.<sup>4</sup> Consequently, such benefits cannot be used to support a public interest showing in this proceeding.

When those supposed benefits are removed, there is almost nothing left. As Telephone USA demonstrated in the Petition, ATNI has no retail wireless experience in the United States.<sup>5</sup>

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<sup>3</sup> *Id.*, 23 FCC Rcd at 17515-16.

<sup>4</sup> Joint Opposition at 3-4.

<sup>5</sup> Petition at 6.

ATNI does not deny this, but instead says that it is committed to maintaining quality service.<sup>6</sup> Maintaining the existing level of service is not a public interest benefit – it is the status quo. Moreover, a mere statement that a purchaser “intends to ‘hit the ground running’” is not sufficient to support a public interest finding.<sup>7</sup> Given that the divestiture itself cannot support a public interest showing, this leaves Verizon Wireless and ATNI without any basis to claim meaningful public interest benefits.

## **II. Verizon Wireless Improperly Failed to Address the Commission’s Concerns About Diversity in the Wireless Marketplace.**

As described in the Petition, the *Alltel Merger Order* plainly sets out the Commission’s conclusion that the public interest would be advanced if the divestiture process accounted appropriately for the disadvantages faced by independent small, minority- and women-owned businesses in obtaining access to the wireless marketplace.<sup>8</sup> In that order, the Commission specifically noted that such issues would be part of its public interest analysis “when an application is filed seeking the Commission’s consent to the transfer or assignment of the Divestiture Assets.”<sup>9</sup> The Petition demonstrated that Verizon Wireless ignored the Commission’s intent to facilitate participation by non-traditional bidders.<sup>10</sup> In light of that fact, Verizon Wireless should be required to re-open the divestiture process and seek bids on terms that would accommodate independent small, minority- and women-owned bidders.

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<sup>6</sup> Joint Opposition at 7 & n. 16. Telephone USA notes that ATNI and Verizon Wireless no longer appear to be relying on the transition services agreement as a public interest benefit. *See* Petition at 6-7.

<sup>7</sup> Joint Opposition at 7.

<sup>8</sup> Petition at 5.

<sup>9</sup> *Alltel Merger Order*, 23 FCC Rcd at 17518.

<sup>10</sup> Petition at 5-6.

The Joint Opposition addresses this issue by creating a straw man, and arguing that the Commission's case law prohibits consideration of the question of whether there might be a better buyer than the one chosen by the seller.<sup>11</sup> But that is not what the Petition argues. Rather, the Petition demonstrates that the process used by Verizon Wireless was calculated to give the appearance of seeking to sell to an independent small, minority- or women-owned company without creating any actual opportunity for such a company to succeed. In other words, the Petition does not claim that there is some other, better buyer. Instead, it shows that Verizon Wireless deliberately chose to create a process that would ignore the Commission's admonition to give minority-owned bidders a full and fair opportunity to win the divested licenses.<sup>12</sup>

Given the Commission's specific statement that it would consider diversity issues when it reviewed the divestiture applications, there can be no doubt that considering those issues is appropriate now. Moreover, those issues have nothing to do with the specific buyers chosen by

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<sup>11</sup> Joint Opposition at 12. This, of course, is not always true. In certain circumstances, the Commission's policies require it to consider whether a specific buyer is suitable. *See, e.g.*, 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Order on Reconsideration*, 23 FCC Rcd 2010, 2054 (2008) (requiring entities seeking waivers of the local television ownership rule to “demonstrate that there is no buyer outside the market willing to purchase the station at a reasonable price”).

<sup>12</sup> Petition at 5-7. The Joint Opposition cites the 1994 *McCaw/AT&T Order* to argue that the Commission has rejected arguments that a seller should demonstrate that a minority buyer was not available, but that decision was made in a vastly different factual context. In that case, there was no pre-existing language to support giving minority candidates a fair opportunity to purchase the systems being sold and no statement that diversity issues would be considered when divestiture applications were filed. Indeed, the *McCaw/AT&T Order* stands for the proposition that the Commission looks to previous orders to determine what actions a licensee is required to take when selling its systems, which is precisely what Telephone USA is asking the Commission to do here. *See Applications of Craig O. McCaw and American Telephone and Telegraph Company, Memorandum Opinion and Order*, 9 FCC Rcd 5836, 5917-18 (1994) (indicating that waivers of cut-off rules will be evaluated in light of the Commission's previously established criteria).

Verizon Wireless. Indeed, if Verizon Wireless could show that it used a process that gave non-traditional buyers a reasonable opportunity, the final choice of the buyer would be irrelevant.

However, the facts demonstrate otherwise. As shown in the Petition, Verizon Wireless tried to make it appear that it was helping minority bidders, but nothing that Verizon Wireless did actually addressed the specific concerns that affect minority bidders, and therefore the process did nothing to improve the chances that an independent small minority or female bidder would be successful.<sup>13</sup> Every decision that mattered, from the types of bids that Verizon Wireless said it preferred to its unwillingness to negotiate directly with independent small, minority and female bidders to its ultimate choice of ATNI over an independent small, minority bidder that offered \$800 million more than ATNI, disadvantaged independent small minority and female buyers and effectively prevented Telephone USA or any other non-traditional bidder from having any chance of success. In reality, Verizon Wireless favored bidders that were not independent, small or minority- or women-owned – AT&T and ATNI – by accepting their bids even though they did not meet the stated criteria for bidding.<sup>14</sup>

Verizon Wireless's claims to the contrary amount to nothing. Even accepting the Joint Opposition at face value, Verizon Wireless admits that all it did was send bidding materials to "a large variety of prospective buyers"; include four potential minority bidders in a group of "over 20" companies that engaged in "more-detailed due diligence conversations"; and grant

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<sup>13</sup> See Petition at 5-6. Among other things, Verizon Wireless initially tried to bundle all of the markets into a single package; rejected a bid from Telephone USA for the entire package that was larger than the amount it ultimately agreed to accept for the divested assets; rejected efforts to negotiate individually with minority bidders; and insisted that all bidders have pre-arranged financing (although, in fact, ATNI's financing is contingent on agreement from its lenders). *Id.*

<sup>14</sup> Specifically, Verizon Wireless sold only a portion of the divestiture markets to AT&T, despite its stated preference for selling all of the markets to a single bidder, and agreed to sell the remaining markets to ATNI, even though ATNI required consent from its lenders and therefore did not have assured financing.

procedural relief, such as relaxed deadlines, to some minority bidders.<sup>15</sup> Of course, none of these actions addressed the specific concerns that affect independent small minority- and women-controlled businesses, such as the availability of financing. Instead, all of Verizon Wireless's actions were cosmetic, designed to make it appear that non-traditional bidders were given a chance.

Indeed, Verizon Wireless says nearly as much in its final justification for shutting out non-traditional companies: It was compelled to do so to address “government-imposed constraints.”<sup>16</sup> While blaming the Commission and the Justice Department may be convenient, there is no basis for this claim. First, Verizon Wireless chose AT&T as one of the buyers. AT&T was the one potential buyer most likely to meet with objections at the Commission and before the Department of Justice. Second, while Verizon Wireless says that this consideration led it to “look beyond just the dollar amount of the bid in selecting a buyer,” that is an implausible explanation for accepting a bid that was 80 percent less than that of a competing bidder.<sup>17</sup> Moreover, given the Commission's expressed desire that Verizon Wireless take actions to assist independent small, minority- and women-owned bidders, it was Verizon Wireless's responsibility to meet all of the Commission's goals, not just the ones Verizon Wireless wanted to meet. Consequently, the evidence demonstrates that grant of these applications would not serve the public interest.

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<sup>15</sup> Joint Opposition at 15-18. It is noteworthy that Verizon Wireless does not say that the only parties that received procedural relief were minority bidders.

<sup>16</sup> Joint Opposition at 18-19.

<sup>17</sup> *Id.* at 19.

### III. The Applications Should Be Designated for Hearing.

Verizon Wireless and ATNI bear the burden of demonstrating to the Commission that grant of their applications is in the public interest. If the Commission cannot reach that conclusion on the basis of the applications, and if there is a substantial and material question of fact, the Commission must designate the applications for hearing.<sup>18</sup> The evidence shows that Verizon Wireless and ATNI are far from meeting their burden; indeed, the record reveals no basis to conclude that there are any real public interest benefits, and the public interest harms that accrue from Verizon Wireless's decision to ignore the Commission's intent that independent, small minority- and women-owned businesses be given a fair opportunity to acquire the divested licenses are substantial.

As described in the Petition, this evidence leads to the same conclusions that the Commission reached in the *EchoStar/DirectTV Order*: The public interest benefits are inadequately supported or not related to the transaction, and are counterbalanced by potential public interest harms.<sup>19</sup> In that case, the Commission determined that the applications had to be set for hearing. Here, the evidence in support of the applications is even weaker, and the potential harms are large. If the applications are not set for hearing, they must be denied.

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<sup>18</sup> Petition at 8-10.

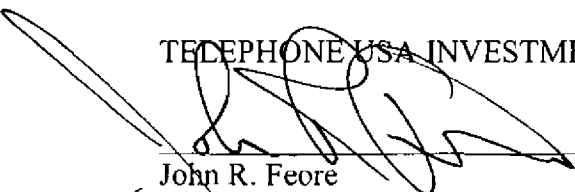
<sup>19</sup> *Id.* at 10, *citing* Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferee), *Hearing Designation Order*, 17 FCC Rcd 20559, 20664 (2002).

**IV. Conclusion**

For all these reasons, the Commission should deny the applications for the assignment of licenses and transfer of control from Verizon Wireless to ATNI or set them for hearing to determine whether the facts are sufficient to support grant of the applications.

Respectfully submitted,

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August 27, 2009



## **CERTIFICATE OF SERVICE**

I, Vicki Lynne Lyttle of Dow Lohnes PLLC do hereby certify that on this 27th day of August, 2009, copies of the foregoing Reply of Telephone USA Investments, Inc. were served upon the following:

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**August 27, 2009**

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